

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JADIR A. MILLER,

Petitioner - Appellee,

v.

DIANA K. BUTLER, Warden,

Respondent - Appellant.

No. 03-56723

D.C. No. CV-02-00521-JNK

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted December 5, 2005**

Before: GOODWIN, W. FLETCHER and FISHER, Circuit Judges.

California state prison warden Diana K. Butler appeals the district court's partial grant of the habeas relief requested in Jadir A. Miller's 28 U.S.C. § 2254 habeas petition. The district court granted Miller habeas relief on his attempted

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

rape conviction and left intact his convictions for attempted murder and false imprisonment by violence. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Butler contends that the district court erred by finding that the California Court of Appeal's application of harmless error review to Miller's instructional error claim was contrary to *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In light of our decision in *Gibson v. Ortiz*, 387 F.3d 812 (9th Cir. 2004), we disagree. California Jury Instruction Nos. 2.50.01 and 2.50.1, as given in his case, impermissibly lower the government's burden of proof and result in structural error that precludes harmless error review. *See id.* at 822-25. Accordingly, the district court correctly found that the California Court of Appeal's decision affirming Miller's conviction for attempted rape was contrary to clearly established federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1); *Gibson*, 387 F.3d at 822-25 (holding that a state court decision which found the use of the same combination of jury instructions to be constitutional was contrary to *In re Winship*, 397 U.S. 358 (1970), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993)).

AFFIRMED.